(11) (10)

NO. 86-71 & 86-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CTS CORPORATION,
Appellant,
v.
DYNAMICS CORPORATION OF AMERICA,
Appellee.

STATE OF INDIANA,
Intervenor-Appellant,
v.
DYNAMICS CORPORATION OF AMERICA,
Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF UNITED SHAREHOLDERS ASSOCIATION IN SUPPORT OF APPELLEE

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T. Boone Pickens United Shareholders Association (hereinafter "United Shareholders Association") respectfully submits this brief, with the consent of the parties, as Amicus Curiae in support of Appellee, Dynamics Corporation of America, to urge the Court to affirm the decision by the United States Court of Appeals for the Seventh Circuit which held that portions of the Indiana Business Corporation Law were unconstitutional under the Supremacy Clause and the Commerce Clause.

INTEREST OF AMICUS CURIAE

Amicus Curiae United Shareholders Association is a non-profit corporation organized and operated to:

(1) promote the welfare of the citizens of the United States of America by supporting the dissemination of ideas and actively encouraging legislative, regulatory, corporate and/or public reform in order to create lasting economic property and bolster the economic competitiveness of American business through the increased responsiveness and accountability of corporate management to shareholders;

(2) promote the public welfare by serving as an advocate before the general and shareholder public for the promotion of responsive, democratic corporate governance;

(3) heighten public awareness in the fields of responsible corporate governance and stockholders rights and the detrimental social and macroeconomic effects of the lack of responsive corporate governance; and

(4) further the ideals of responsible corporate governance and stockholders rights through the encouragement of the democratic operation of American business.

United Shareholders Association has an interest in this appeal because this Court's decision will have broad ramifications for all shareholders wishing to exercise their prerogative to participate in interstate transactions and to cast their individual votes in matters of corporate governance. The central issue presented to this Court is whether or not a state, cloaking itself in the veil of the regulation of corporate internal affairs, may delegate to incumbent corporate management the power to regulate significant interstate commercial transactions. The state cannot constitutionally exercise this power in its own right, yet it would authorize incumbent management to wield extensive powers directly affecting national markets. This deputization significantly interferes with interstate commercial transactions and subjects the individual shareholder to the tyranny of a management-controlled minority.

In contrast to those actions which are truly "internal" to the corporation, the individual shareholder here has no remedy for the actions management takes in compliance with the Indiana Control Share Acquisitions Chapter.[1] Thus, management and a few shareholders sympathetic to management are empowered to strip valuable property rights, the ability to tender shares with voting rights intact, from a target company's shareholders at the very moment that those rights attain their highest value for the shareholder.

1. Ind. Code Ann. §§ 23-1-42-1 to 11 (Burns Cum. Supp. 1986) (the "Control Share Chapter" or the "Chapter"). In matters of legitimate "internal affairs" a breach of fiduciary duty by management can be called into question by a derivative action brought by a shareholder on behalf of the corporation.

THE INDIANA CONTROL SHARE ACQUISITIONS CHAPTER

A summary of the relevant provisions of the Control Share Chapter is necessary in order for this Court to assess its deleterious effect upon significant interstate transactions and its obvious ability to frustrate the policies of the Williams Act.

Once a corporation has opted into the Chapter, the shares of that corporation acquired by a party in excess of certain ownership thresholds[2] are automatically stripped of their voting rights. Voting rights reattach *only* after completion of a process completely controlled by management.

If an acquiring person wishes to regain the voting rights ordinarily attendant to the excluded shares, he may request a shareholder meeting *and* undertake to pay the corporation's expenses at such special meeting. Within ten (10) days thereafter the incumbent directors must call a special meeting to be held *within fifty (50) days* after receipt of the request.[3] Management is not required to hold the special meeting before the scheduled expiration of any proposed tender offer and there is no provision allowing the offeror to accelerate the meeting. Similarly, no provision is made to bar the target corpora-

2. § 23-1-42-1. "*'Control shares' defined*": "'control shares' means shares that . . . when added to all other shares . . . owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person . . . to exercise or direct the exercise of the voting power of the . . . corporation . . . within any of the following ranges of voting power: (1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power. (2) One-third (1/3) or more but less than a majority of all voting power. (3) A majority or more of all voting power."

3. § 23-1-42-7. "*Shareholder meeting to determine control share voting rights.*"

tion from taking defensive steps during the waiting period.[4] If no special meeting is requested, the voting rights to be accorded the shares acquired will be decided at the next special or annual meeting of shareholders.[5]

It is management's sole responsibility to prepare and take a position on a voting rights resolution, and to present the resolution to the shareholders.[6] The notice of the shareholder meeting is to include:

(i) a copy of the acquiring person's statement;

(ii) a statement by the Board of Directors of the corporation of its position or recommendation.[7]

No provision is made for any statement by, or solicitation on behalf of, the acquiring person.

Thus, fused upon the tender offer process is a proxy contest, with its potential for additional delay. Moreover, it is a proxy contest in which only the cossetted domestic corporation may solicit proxies. *Any proxies obtained by*

4. "According to the Securities & Exchange Commission, delay enables a target company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an anti-trust violation should the tender offer succeed; (5) arrange a defensive merger [target initiated transactions are specifically exempted from the Control Share Chapter. § 23-1-42-2(e)]; (6) enter into restrictive loan agreements; (7) institute litigation challenging the tender offer." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (quoting *Edgar v. MITE Corp.*, 457 U.S. at 637 n.13, 102 S. Ct. at 2638, n.13). Additional defenses such as the increasingly popular "poison pills" are equally available to incumbent management.

5. § 23-1-42-7(c). *"Shareholder meeting to determine control share voting rights."*

6. § 23-1-42-7. *"Shareholder meeting to determine control share voting rights."* § 23-1-42-8. *"Notice of shareholder meeting."*

7. § 23-1-42-8. *"Notice of shareholder meeting."*

the acquiring person in support of the voting resolution fall within the definition of "interested share(s)," and are automatically stripped of voting rights.[8]

To pass, the voting resolution must be approved by:

(i) a majority of all shares; *and*

(ii) a majority of all *"disinterested"* shares.[9]

No deadline is imposed by the statute for the tallying of the shareholder vote, allowing management to further prolong the process beyond the fifty (50) day delay already provided management by the Control Share Chapter.

Voting rights reattach only to the extent granted by the resolution. If the resolution fails or if the acquiring person elects not to file an acquiring person's statement, the corporation may redeem the control shares at a "fair value thereof pursuant to the procedures adopted by the corporation."[10]

8. § 23-1-42-3. *"'Interested shares' defined."* ". . . '[I]nterested shares' means the shares of an issuing public corporation in respect of which [an acquiring person] *may exercise or direct the exercise* of the voting power of the corporation. . . ."

Read literally, the Chapter precludes not only uninvited tender offers but also proxy contests where the number of proxies obtained exceeds the statutory thresholds.

9. § 23-1-42-9. *"Resolution granting control share voting rights."* Unable to vote are those shares held by the acquiring person, officers of the corporation and any employees who are also directors. Those shares held by outside directors, who are clearly "interested" in any contest for control, are not excluded.

10. § 23-1-42-10-(a). *"Redemption of control shares."* Contrast to § 23-1-42-11(c), *"Rights of dissenting shareholders"* in which the fair value for the dissenting shareholder is defined as a value not less than the highest price paid per share by the acquiring person in a control share acquisition. No similar definition of fair value is included in Section 23-1-42-10, *"Redemption of control shares."* Instead, fair value is that value determined by the corporation.

SUMMARY OF ARGUMENT

Acting out of an excess of protectionistic zeal and in an effort to avoid this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), numerous state legislatures have rushed to enact second-generation takeover statutes,[11] of which the subject Control Share Chapter is but one example.[12] The impulse giving rise to such second-generation statutes, a putative interest in protecting local jobs and industry, constitutes exactly that type of economic isolationism and parochialism prohibited by the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8, cl. 3. Moreover, the second-generation statutes clash with and frustrate the Congressional policies embodied in the Williams Act, 15 U.S.C. §§ 78m (d)-(e), 78n(d)-(f), and thus violate the Supremacy Clause, U.S. Const., art. VI, cl. 2.

A statute that ostensibly regulates one type of transaction, but whose practical effect is to discourage or to interfere with another, must be tested for both Supremacy Clause and Commerce Clause purposes as though it regulated both transactions. That the inhibiting impact of the second-generation statutes arises out

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11. *Control Share Acquisition Statutes*: Hawaii, Indiana, Maine, Minnesota, Missouri, Ohio, Pennsylvania and Utah.

Fair price legislation: Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Pennsylvania, Virginia, Washington and Wisconsin.

12. The Control Share Chapter was passed in response to bids by nonresidents for two large Indiana corporations. 3 *Corporate Control Alert* 1, 10-11 (March 1986) (App. 141-142).

> When asked why Indiana had decided to adopt such a virulent statute, James Strain, an Indianapolis corporate lawyer from Barnes & Thornburg [counsel for Appellant CTS] said "We don't like having all our companies taken over by East Coast firms." On further reflection, Strain says Midwestern and West Coast acquirors are no better.

3 *Corporate Control Alert* 1, 10 (March 1986) (App. 141).

of practical impossibility and increased transaction costs rather than from an outright prohibition does not redress the imbalance, one at odds with the neutral position of the Williams Act. That the impact of the legislation flows from the regulation of voting rights after a control share acquisition, the "back end" of the transaction, rather than direct regulation of the offer, is constitutionally insignificant.

The Chapter was designed, drafted and intended to insulate Indiana corporations from the interstate market for corporate control.[13] The statute comes into play even if the tender offeror, the management of the target company and ninety percent of the company's shareholders are non-residents of Indiana.[14] The Commerce Clause ramifications are obvious. Out-of-state management of an Indiana corporation is permitted to strip the voting rights from shares tendered by out-of-state shareholders to an out-of-state offeror in response to a nationwide tender offer.

Unlike the Minnesota Act upheld in *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984), the Indiana Control Share Chapter is not closely tailored to advance the legitimate interests of Indiana. The dramatic sweep of the Chapter is exemplified by the fact that an individual residing in New York could not sell a twenty percent interest in an Indiana corporation to a California

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13. See footnote 12, *supra*.

14. The percentage of non-resident shareholders could be much higher. By its terms, the Chapter applies if 10,000 Indiana residents hold shares in the company. CTS Corporation has 5,700,000 shares outstanding. If 10,000 Indiana residents each owned one share, the ownership of roughly .176% of the stock by Indiana residents would trigger the application of the Chapter. Indiana would then hold the interstate market for corporate control captive even though 99.824% of the shares were held by non-Indiana residents.

resident without being subject to the Chapter. That single sale, if the purchaser required that the shares be attended by voting rights, would require that the potential buyer file an acquiring person statement, request a special shareholder meeting, undertake to pay the expenses incurred in connection with such a meeting and then await the passage of fifty days (or more) for shareholder approval. The effect of the legislation upon interstate commercial activity is direct;[15] it is intended; it is substantial.

By its introduction of significant, indeed almost limitless, delay into the tender offer process, and its superimposition of a completely one-sided proxy contest upon the endeavor, the Chapter clashes directly with the Williams Act, decidedly tipping the scales in favor of the target corporation and its incumbent management and providing them with potent advantages with which to frustrate the pro-competitive effects of the tender offer effort.

The decision to take advantage of an offer, to receive a control premium for his or her shares, is no longer the independent economic decision of the individual shareholder. Instead, the investor is bound by the collective decision of the "disinterested" shareholders of the target company, presumably those who have not tendered and who are adverse to the offer. To this extent the Control Share Chapter offers illusory investor protection at the expense of investor autonomy.[16] If allowed to stand, this and similar legislation would lead inexorably to a Balkanization of the Nation's corporate economy.

15. Indiana concedes the direct impact of the statute upon tender offers by its extended discussion of alternative strategies foisted upon offerors. Brief of Intervenor-Appellant State of Indiana, pp. 63-68.

16. *Edgar v. MITE Corp.*, 457 U.S. at 639-640.

ARGUMENT

I. THE INDIANA CONTROL SHARE ACQUISITION CHAPTER VIOLATES THE COMMERCE CLAUSE.

The Control Share Chapter should be struck down as violative of the Commerce Clause. The Chapter's "avowed purpose" and "necessary tendency"[17] is to directly and substantially interfere with the interstate market for corporate control. The statute also violates the Commerce Clause by placing burdens upon interstate commerce which far outweigh the local benefits it purports to advance.

A. The Commerce Clause is Designed to Prevent the Balkanization of the Union and Prohibits Indiana from Regulating Interstate Commerce.

Through the years, this Court has been guided in its interpretation of the Commerce Clause by the basic principle that "our economic unit is the Nation." *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 537 (1949). While some interference with the national economy may be tolerated when a state secures a cleaner, healthier, safer environment for its citizens,[18] this Court has often noted that simple economic protectionism is subject to a virtually *per se* rule of invalidity. *See, e.g., City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978).

Naturally, it is the rare state statute that boldly proclaims its purpose to be the advancement of parochial

17. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

18. Even in these areas of traditional local concern, however, the Court will accord less deference to the legislative judgment, "where the local regulation bears disproportionately on out-of-state residents and businesses." *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 675-76 (1981).

local interests via direct discrimination against interstate commerce. However, a finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, ___, 104 S. Ct. 3049, 3055 (1984); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471 (1981). In analyzing state *economic* regulation under the Commerce Clause, the key consideration is the overall effect of the state law on both local and interstate activity. *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* ___U.S.___, 106 S. Ct. 2080, 2084 (1986).

With the Control Share Chapter, Indiana has declared that *its* economic unit is Indiana. The state's avowed purpose is to "shield[] in-state industries from out-of-state competition," *Maine v. Taylor,* ___U.S.___, 106 S. Ct. 2440, 2453 (1986); the statute's natural tendency is to significantly depress the market for control of Indiana corporations.[19]

B. The Control Share Chapter Should be Struck Down as a Direct Violation of the Commerce Clause.

In *Brown-Forman, supra,* the Supreme Court reaffirmed that it has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause.

> When a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests,* we have generally struck down the statute without further inquiry. . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. . . .

Brown-Forman, 106 S. Ct. at 2084 (emphasis supplied).

19. Needless to say, if this statute is valid, many or all of the other forty-nine (49) states will be pressured to enact similar legislation, in order to appease management of *their* domestic corporations. *See Edgar v. MITE Corp.,* 457 U.S. at 642.

While artfully drafted to avoid a simple comparison with the Illinois statute struck down in *Edgar v. MITE Corp.,* 457 U.S. 624 (1982), the Chapter is designed to directly regulate the interstate market for corporate control. This statute does not merely make it slightly more cumbersome for an uninvited suitor to take control of an Indiana corporation. Instead, the state has "overtly moved to slow or freeze the flow of commerce for protectionist reasons." *Philadelphia v. New Jersey,* 437 U.S. at 628. That Indiana deputizes the party most likely to obstruct interstate commerce to perform the interfering acts does not alter the analysis. To allow such a subterfuge to pass muster would be to glorify form over substance and "invite[] facile evasions of the [Commerce C]lause." *Dynamics Corp. of America v. CTS Corp.,* 794 F.2d 250, 264 (7th Cir. 1986).

The purpose of this statute is crystal clear. The origins of the statute[20] and the admissions made throughout the Brief of the State of Indiana show its true purpose: the shielding of Indiana corporations, Indiana jobs and Indiana industry from the effects of the interestate marketplace for corporate control.

Additionally, the Chapter effectively stymies tender offers for shares of Indiana corporations by forcing ac-

20. See footnote 12, *supra.*

quiring persons to overcome immense hurdles if they wish to exercise the most basic right adherent to their ownership interest in the corporation, the right to vote. The Chapter applies even though the acquiring person, the offerees and incumbent management are all non-residents of Indiana; it applies even though the corporation is headquartered outside of Indiana; it applies even though ninety percent (or more) of the shareholders reside outside Indiana; it applies if a hostile tender offer is commenced; and, it applies when a Florida owner of twenty percent of an Indiana corporation wishes to sell his shares to an Alaska purchaser. The practical effect of the Chapter is to regulate conduct far beyond the borders of the state. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 775 (1945); *Edgar v. MITE Corp.,* 457 U.S. at 643. This Chapter does not merely *rearrange* an interstate market among various entities engaged in interstate commerce. *See, e.g., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978). It acts to *eliminate,* or at least greatly diminish, the interstate market for corporate control. The conclusion that the Indiana Control Share Acquisition Chapter is simple economic protectionism, designed to shield Indiana from the common market of the states, is inescapable.

C. The Burdens Imposed on Interstate Commerce by the Control Share Chapter Strongly Outweigh any Putative Local Benefits. The Chapter Advances no Benefits Which Are Not Better Served by Other Legislation.

This Court long ago made a pertinent observation:

> Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

It is respectfully suggested that this Court disregard the "nice distinctions . . . between direct and indirect burdens" and declare this statute to be *per se* violative of the Commerce Clause. However, because this Court has observed that "no clear line separat[es] the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach[,]" *Brown-Forman,* 106 S. Ct. at 2084, a discussion of the *Pike* test is also appropriate.

The *Pike v. Bruce Church* balancing test consists of two prongs:

> [1] Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. [2] And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The allocation of the burden of proof when a statute is challenged was addressed in later cases.

> Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves the legitimate local purpose," and that this purpose could not be served as well by available non-discriminatory means.

Maine v. Taylor, 106 S. Ct. at 2448.

1. The Burdens on Interstate Commerce Imposed by the Control Share Chapter Far Outweigh any Valid Interests Advanced by the Statute.

The direct burdens on interstate commerce imposed by the Chapter have been adequately described elsewhere.[21] The statute establishes nearly insuperable hurdles to prevent tender offerors, wherever resident, from transacting business with other shareholders.

To balance against this direct burden, Indiana suggests that the Chapter advances several state interests: (1) an interest in the welfare of employees of domestic corporations with headquarters, factories or other operations in the state; (2) an interest in "enacting the Indiana statute for the benefit of *all* shareholders of covered Indiana corporations"; and (3) an interest in protecting minority shareholders from the coercive effects of two-tiered tender offers.

What the state fails to recognize is that the protection of state jobs and industries, while a laudable goal, may not be advanced by the enactment of discriminatory legislation, the purpose and effect of which is to stifle interstate commerce. *Toomer v. Witsell,* 334 U.S. 385 (1948). "[T]he Court has viewed with particular sus-

21. *See ante,* pp. 3-5.

picion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. . . . [T]his particular burden on commerce has been declared to be virtually *per se* illegal." *Pike,* 397 U.S. at 145. While the state has every right to promote the economic welfare of its citizens, it cannot do so by erecting barriers to corporate control at the state borders. Our economic unit is the Nation; it must be Indiana's economic unit also.

The suggestion that Indiana has a legitimate interest in the welfare of *any* shareholder of an Indiana corporation, wherever resident, flies in the face of the majority opinion (Section V-B) in *Edgar v. MITE Corp.,* 457 U.S. at 644: "While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders." In this regard, the emphasis placed by CTS and Indiana upon the "internal affairs doctrine" is misplaced. CTS and Indiana interpret this conflicts of law principle[22] as granting Indiana unfettered license to interfere with the national market for corporate control. But Indiana is granted no extraordinary interest in a corporation simply because that corporation has filed a few papers with the Indiana Secretary of State and pays a *de minimus* annual fee into the state coffers. Corporate voting rights do have their basis in state law, as Indiana notes, but these rights may not be regulated without regard to the effect on interstate commerce. "[T]he right to engage in interstate commerce is not the gift of a state. . . ." *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 808 (1976).

22. *Edgar v. MITE Corp.,* 457 U.S. at 645 (majority opinion).

In their haste to invoke the "internal affairs doctrine" as justification for the extensive regulation of interstate commerce, CTS and Indiana forget the teaching of this Court. "Tender offers contemplate transfers of stock by stockholders to a third party *and do not themselves implicate the internal affairs of the target company.*" *Edgar v. MITE Corp.*, 457 U.S. at 645 (majority opinion, emphasis added). Here Indiana regulates *shareholders,* not Indiana corporations. *Fleet Aerospace Corp. v. Holderman,* 637 F. Supp. 742, 763 (S.D. Ohio 1986), *aff'd* 796 F.2d 135 (6th Cir. 1986).

Perhaps most importantly, the Chapter, while denuding some shareholders of the right to vote their stock at the whim of management, does not advance the very interests it purports to protect. Nothing in the statute prevents *management* from selling Indiana assets, shutting down Indiana factories and eliminating Indiana jobs;[23] nothing in the Chapter protects minority shareholders from coercive two-tiered tender offers, so long as *management* is friendly to the offeror; finally, nothing in the Chapter prevents the great majority of shareholders from losing the potential benefits[24] of the interstate market for corporate control. *Dynamics v. CTS,* 794 F.2d at 264. The Chapter spells the demise of eminently fair "any and all" tender offers just as assuredly as it defeats two-tiered tender offers. The only distinction recognized by the statute is whether or not the bidder is friendly to management.

Thus, balanced against a directly intended, highly effective burden on interstate commerce is *one* putative benefit—the protection of Indiana resident minority shareholders from coercive two-tiered tender offers. (While the *Pike* test envisions the Court weighing "putative local benefits," it need not weigh nonexistent or invalid concerns.) Where, as here, the burden on interstate commerce is direct, intended and substantial, the state has the burden of showing that its oppressive legislation would actually advance the state's only legitimate interest. Indiana has not done so;[25] instead, it has enacted a statute which interferes with the interstate market for corporate control, while leaving incumbent management free to alter the Indiana economic base as it pleases.

23. *Fleet Aerospace,* 637 F. Supp. at 764.

24. *See* discussion of benefits of tender offers to shareholders in *Edgar v. MITE Corp.*, 457 U.S. at 643 (majority opinion).

2. Any Legitimate Local Purpose Served by the Control Share Chapter could be Served as Well by Available Nondiscriminatory Means.

In its brief of December 4, 1986, Indiana omitted mention of the second prong of the *Pike v. Bruce Church* test:

> [T]he extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interestate activities.*

Pike, 397 U.S. at 142 (emphasis supplied). *See also, Maine v. Taylor,* 106 S. Ct. at 2448.

Here, the nature of the concern is the regulation of Indiana corporations. The state's interest in economic regulation is accorded a much lower status in Commerce Clause analysis than is its interest in safety regulations,

25. The state has indicated it has no evidence it wants to present. *Dynamics v. CTS,* 794 F.2d at 260.

health matters or the local environment. *H. P. Hood & Sons*, 336 U.S. at 533; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). Significantly, Indiana has enacted two other statutes which purport to provide exactly that type of protection Indiana suggests is needed by shareholders of Indiana corporations. The Indiana Business Combination Statute[26] and the Dissenters' Rights Statute[27] both provide protection for minority shareholders caught in the "back end" of purportedly coercive two-tiered tender offers.[28] The Control Share Chapter, on the other hand, "protects" shareholders from the beneficial impact of fair tender offers, while providing no shareholder protection from the array of defensive maneuvers available to management.

II. THE CONTROL SHARE ACQUISITION STATUTE IS PREEMPTED BY THE WILLIAMS ACT.

Under the Supremacy Clause, the issue is whether Indiana's Control Share Chapter is preempted by the Williams Act. The Chapter is preempted because: (1) it conflicts directly with the requirements of the Williams Act;[29] and (2) it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act.[30]

26. Chapter 23-1-43.

27. Chapter 23-1-44.

28. Amicus Curiae takes no position here on the wisdom or constitutionality of either statute.

29. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Franklin Nat'l Bank of Franklin Square v. People*, 347 U.S. 373 (1954).

30. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

The Control Share Chapter directly conflicts with the Williams Act by requiring the approval of a majority of "disinterested" shareholders before the objective of a tender offer can be fulfilled, i.e., the takeover of the company.[31] The mechanism by which such approval is obtained rests entirely in the hands of management.[32] The process is replete with an array of opportunities for delay, uncertainty and unfairness. The Chapter allows nationwide tender offers to be scuttled by a small minority of shareholders: (i) sufficient Indiana shareholders to invoke the Chapter and (ii) a majority of the "disinterested" shareholders, presumably those who oppose the offer. *See* footnote 14, *supra*.

The Chapter also conflicts with and frustrates the objectives of the Williams Act. The Williams Act is the product of intense investigation, discussion and compromise by Congress. Congress sought to promote fairness and protection of the investor-shareholder in the tender offer setting. It also considered the opportunities that should be available in our national free market system for incumbent management to retain its control of a company and for others to oust that management when they believe they can do a better job. This is the essence of the balancing of the Williams Act and the neutrality sought by Congress in the tender offer setting. The ". . . function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then *to let the investor decide for*

31. Ind. Code Ann. § 23-1-42-9.

32. Ind. Code Ann. §§ 23-1-42-7, 8 and 10.

himself."[33] ". . . Congress intended for investors to be free to make their own decisions."[34] "Congressional policy is to permit the investor his own independent but informed decision whether to sell."[35]

A. The Control Share Chapter Conflicts Directly with the Requirements of the Williams Act.

One of the chief problems with the Chapter is the delay and uncertainty which it injects into the tender offer process. The Chapter allows management to delay a special shareholder meeting on the voting rights issue for at least fifty (50) days. No provision is made in the Chapter for the tallying of the vote on the resolution. During this time period, the potential acquiror cannot reasonably be expected to purchase any tendered shares—they have been stripped of their voting rights, rights restored only by a majority vote of the "disinterested" shareholders. Similarly, management cannot be expected to sit quietly during this time period. Undoubtedly, it will use the additional time to put various defensive measures in place, time which would be unavailable to it under the Williams Act.

In contrast to the almost unlimited delay provided for by the Control Share Chapter, the Williams Act permits the tender offeror to close an offer after twenty (20) business days. In drafting the Williams Act, Congress recognized that delay deters wealth-maximizing tender offers by giving entrenched management more time to

33. *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276 (5th Cir. 1978) *rev'd on venue grounds sub nom., Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) (emphasis added).

34. *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982).

35. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d at 568.

implement defensive measures.[36] As noted previously, delay enables a target company to repurchase stock, enter into lock-up arrangements, announce dividend increases or stock splits, issue more stock, arrange defensive mergers, enter into restrictive loan agreements, institute litigation or take other action to increase the cost and uncertainty of the take-over attempt. *Martin-Marietta Corp., supra,* at 568.

The fact that the State of Indiana can conjure up a method by which tender offerors could hypothetically comply with both the Williams Act and the Indiana statute misses the mark entirely.[37] The Williams Act sets forth the obligations of a tender offeror seeking control of a company. Obviously, if an offeror wanted to, it could leave its offer open longer or it could heavily condition its acceptance of tendered shares, but the imposition of such delay, the creation of such uncertainty, upsets the balance and neutrality sought by the Williams Act, tipping the scales greatly in favor of management.

36. *Edgar v. MITE Corp.*, 457 U.S. at 636-38.

Congress continued to recognize the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 12 et seq.:

> [I]t is clear that the short waiting period [the 10-day proration period provided in § 14(d)(6) of the Securities Exchange Act of 1934 which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success.

H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & A. News 2637, 2644.

37. Brief of Intervenor-Appellant State of Indiana, at 62-77.

The Chapter's approval process also superimposes a one-sided proxy contest on the tender offer. By stripping the voting rights of all shares or proxies tendered to the acquiror and by establishing a procedure whereby the so-called "disinterested" shareholders control the outcome of the resolution, the Chapter directly conflicts with the Congressional intent that the right to vote be a fundamental aspect of equity security ownership and with the atmosphere of "fair play" which Congress intended the proxy rules to foster.[38] As the court said in *Reserve Life Ins. Co. v. Provident Life Ins. Co.*, 499 F.2d 715, 725-26 (8th Cir. 1974), *cert. denied* 419 U.S. 1107 (1975):

> Under these [proxy] rules, an atmosphere of "fair play" must pervade the solicitation of proxies so that in struggles for corporate control, like the present one, competing interests are furnished equal opportunities to communicate with and thereby influence the shareholders in the exercise of their corporate suffrage rights.

Here management is given statutory license to exploit the proxy rules to delay offers beyond the fifty (50) days, thus injecting more uncertainty into the process. Moreover, under the Chapter, management has the exclusive right to present the voting rights issue to the shareholders and to take a position on the issue. No provision is made for the offeror to present its views nor can the acquiring person solicit any proxies in its own behalf. Any proxy granted the acquiring person would fall within the definition of "interested shares" and would automatically be

38. *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) ("fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange").

stripped of voting rights.[39] Such a one-sided proxy solicitation directly conflicts with the Williams Act and the proxy rules promulgated thereunder.[40]

B. The Control Share Act Stands as an Obstacle to the Accomplishment of the Purposes and Objectives of the Williams Act.

As the State of New York so aptly pointed out in its brief,[41] the underlying objective of the Williams Act is the protection of investors. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). Congress sought to protect investors by embracing a policy of strict neutrality between the bidder and management of the target company. In enacting the Williams Act:

> . . . Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "inten[tion] to do . . . more than give incumbent management an opportunity to express and explain its position." . . . Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

Edgar v. MITE Corp., 457 U.S. at 634. This policy of neutrality is "a major aspect of the effort to protect the

39. Ind. Code Ann. § 23-1-42-3.

40. See 15 U.S.C. § 78n.

41. Brief Amicus Curiae of the State of New York in Support of Appellants, at 9.

investor"; it complements the disclosure requirements and other investor protections of the Williams Act.[42]

The Control Share Chapter subverts this protection of investors by putting in place a management-controlled mechanism which makes virtually impossible any uninvited tender offer, regardless of the number of shareholders who favor it. It prevents the shareholder investor from tendering his shares for a premium to an acquiring entity if only a few shareholders in the corporation do not tender and those so-called "disinterested" shareholders vote against the tender offer. Thus, a minority of shareholders sympathetic to management can thwart a tender offer by voting not to restore the voting rights to the acquired shares, leaving the acquiring entity with the bleak prospect of owning a substantial block of stock stripped of the ability to take control of the corporation. The take-over is effectively scuttled, as is the ability of individual shareholders to sell their shares for a premium price. Such control over the outcome of a tender offer by management and those shareholders who may be sympathetic to management clearly upsets the balance of neutrality sought by Congress through the Williams Act.

The states' argument that such legislation encourages bidders to negotiate with incumbent management is a position unsupported by the Williams Act. There is no Congressional preference for negotiated take-overs at the expense of contested take-overs. State statutes that promote this objective, however laudable, must yield to Congress' determination. Contested take-overs should neither be encouraged nor discouraged.

42. *Edgar v. MITE Corp.*, 457 U.S. at 633.

CONCLUSION

As Judge Posner aptly stated, "[t]he Indiana statute is a *lethal* dose [to constitutionally-protected tender offers]; the fact that the Illinois statute [struck down in *Edgar v. MITE Corp.*] may have been two or three lethal doses has no practical significance." *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 262-63 (emphasis supplied). Judge Posner's assessment is accurate—after one lethal dose it is irrelevant how many more are administered. There is no difference between the Illinois statute struck down in *Edgar v. MITE Corp.*, in which a state agency was empowered to pass judgment on the fairness of a tender offer, and the Indiana Chapter in which the voting power of stock is stripped away until the "fairness" of the tender offer is passed upon by a jury of those who have already decided against tendering their shares.

The Chapter violates the Commerce Clause under both the direct regulation and the indirect burden analyses. It obtains no protection from the internal affairs doctrine. It is preempted by the Williams Act and thus violates the Supremacy Clause. This Court should affirm the judgment of the court below.

Respectfully submitted,

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